

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BELINDA F. NORWOOD,

Plaintiff,

vs.

ANDREW SAUL, Acting Commissioner of
Social Security,

Defendant.

Case No.: 2:18-cv-01985-GMN-VCF

ORDER

Pending before the Court is the Motion for Reversal and/or Remand, (ECF No. 18), filed by Plaintiff Belinda F. Norwood (“Plaintiff”). Defendant Andrew Saul (“Defendant”) filed a Response, (ECF No. 20), and a Counter-Motion to Affirm Agency Decision, (ECF No. 19). These motions were referred to the Honorable Cam Ferenbach, United States Magistrate Judge, for a report of findings and recommendations pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C). On November 18, 2019, Judge Ferenbach entered the Report and Recommendation (“R&R”), (ECF No. 21), recommending that Plaintiff’s Motion for Remand be denied and Defendant’s Counter-Motion to Affirm be granted. Plaintiff then timely filed an Objection, (ECF No. 22).

I. BACKGROUND

Plaintiff brings this action pursuant to the Social Security Act, 42 U.S.C. § 405(g) against Defendant in his capacity as the Commissioner of the Social Security Administration.¹ (Compl., ECF No. 4). Plaintiff seeks judicial review of the final decision by the Commissioner of the Social Security Administration, wherein the Commissioner denied Plaintiff’s application for

¹ Plaintiff brought this action against Nancy A. Berryhill, who was the acting Social Security Commissioner when this action began. Andrew Saul is now the acting Commissioner and is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d).

1 social security disability benefits.

2 Plaintiff applied for disability benefits on May 15, 2015. (Admin. Record (“AR”) at 50,
3 ECF No. 17-1). Her application was denied, however, on December 22, 2017, by an
4 Administrative Law Judge (“ALJ”). Plaintiff then appealed the ALJ’s decision to the Appeals
5 Council, but the Appeals Council similarly denied Plaintiff’s application for benefits on August
6 10, 2018. (*Id.* at 1). Accordingly, on December 12, 2018, Plaintiff initiated this action seeking
7 to reverse or remand the decision of the ALJ and Appeals Council.

8 On November 18, 2019, Judge Ferenbach entered the R&R, (ECF No. 21),
9 recommending that Plaintiff’s Motion to Remand this action to the Social Security
10 Administration be denied, and Defendant’s Cross-Motion to Affirm be granted. Plaintiff timely
11 filed an Objection to the R&R on December 2, 2019.

12 **II. LEGAL STANDARD**

13 A party may file specific written objections to the findings and recommendations of a
14 United States Magistrate Judge made pursuant to Local Rule IB 1–4. 28 U.S.C. § 636(b)(1)(B);
15 D. Nev. Local R. IB 3-2. Upon the filing of such objections, the Court must make a de novo
16 determination of those portions of the Report to which objections are made. *Id.* The Court may
17 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
18 Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. Local R. IB 3-2(b).

19 **III. DISCUSSION**

20 Plaintiff objects to Judge Ferenbach’s R&R on three grounds. First, she argues that the
21 ALJ did not apply proper weight to medical records or statements from her treating physician,
22 Dr. Bennett Mitchell; and the R&R failed to recognize that error. (Obj. at 2–3). Plaintiff next
23 objects to the R&R because it should have found that the ALJ wrongly gave less than full
24 weight to her testimony about being unable to sustain a full workday “at even the sedentary
25 level.” (*Id.* at 6). Last, Plaintiff contends that the R&R properly recognized the ALJ’s error in

1 disregarding the testimony of her sister, Pauline Baggett-Jefferson, but the R&R improperly
2 concluded that the error was harmless. (*Id.* at 6–7).

3 The below discussion addresses each of Plaintiff’s objections in turn. The Court’s role
4 is to determine if the ALJ’s decision is either not supported by substantial evidence in the
5 record or was decided under the wrong legal standard. *Molina v. Astrue*, 674 F.3d 1104, 1110
6 (9th Cir. 2012) Substantial evidence “means such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion.” *Valentine v. Comm’r Soc. Sec. Admin.*, 574
8 F.3d 685, 690 (9th Cir. 2009) (quoting *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d
9 573, 576 (9th Cir. 1988)).

10 **A. Objection One**

11 When addressing Plaintiff’s medical conditions, the ALJ found that objective medical
12 evidence in the record did not support Plaintiff’s claimed level of severity in pain and
13 corresponding limitations. (ALJ’s Decision, AR 56–57). The ALJ supported that finding by
14 pointing to Plaintiff’s medical records revealing decreasing pain due to physical therapy and
15 medication. (*Id.*). Further, the ALJ found that the letters and statements from Plaintiff’s
16 treating physician, Dr. Mitchell, attesting to Plaintiff’s inability to work, were inconsistent and
17 deserved only partial weight. (*Id.*). Judge Ferenbach found that substantial evidence in the
18 record supported the ALJ’s determinations, and that the ALJ gave “clear and convincing
19 reasons” for giving only partial weight to Dr. Mitchell’s opinions. (R&R 5:12–15).

20 Plaintiff argues in her Objection that, contrary to the ALJ’s decision and the R&R,
21 objective medical evidence establishes debilitating medical issues of severe degenerative disc
22 disease and stenosis in Plaintiff’s spine, severe degenerative changes in Plaintiff’s knees and
23 hips, and “trigger finger” in both hands. (Obj. at 2–3). Plaintiff adds that medical records show
24 her severe mental impairment as stated by Dr. Mitchell due to anxiety and panic attacks, which
25 the ALJ failed to fully credit when determining disability. Further, Plaintiff contends that each

1 of her conditions have worsened over time and failed to respond to multiple treatment
2 interventions. (*Id.* at 3). Plaintiff thus requests that the Court not adopt the R&R's conclusion
3 on this issue and instead find that the ALJ improperly weighed Dr. Mitchell's opinion.

4 Upon *de novo* review of the R&R, the Court largely agrees with Judge Ferenbach's
5 conclusion that the ALJ gave clear and convincing reasons for applying partial weight to Dr.
6 Mitchell's opinion of disability. The ALJ noted inconsistencies on the severity of Plaintiff's
7 symptoms between reports and statements. For instance, as the ALJ stated, neither Dr.
8 Mitchell's most recent medical source statement before the ALJ's decision nor prior medical
9 source statement from 2015 support Plaintiff's claimed "severe limitations" of being unable to
10 sit, stand and/or walk for a standard 8-hour workday. (ALJ's Decision, AR at 57) (citing July
11 21, 2017 Medical Source Statement, Ex. 20F to AR, ECF No. 17-1). Also, the ALJ noted how
12 Dr. Mitchell's July 21, 2017 statement opined less severe limitations as well as findings that
13 support "light work" capabilities. (July 21, 2017 Medical Source Statement, Ex. 20F to AR)
14 (opining that Plaintiff "should have no extended long periods of standing or walking over 3
15 hours without breaks"); (ALJ's Decision, AR at 57) (explaining how Dr. Mitchell's July 21,
16 2017 opinion is consistent with industry-standard work schedules). Likewise, the ALJ
17 explained why it relied in part on the Disability Determination Services' ("DDS") findings that
18 Plaintiff's "knees, neck, and bilateral hand pain is well-controlled with pain medication,
19 periodic injections and physical therapy." (ALJ's Decision, AR at 58). These findings are
20 consistent with Plaintiff's medical records. (*See* June 21, 2017 Progress Note, Ex. 18 F to AR at
21 535, ECF No. 17-1) ("Patient continues to receive physical therapy with mild improvement");
22 (July 21, 2017 Progress Note, Ex. 19F to AR at 587–88, ECF No. 17-1) (noting that Plaintiff
23 "reported stable mood," was progressing, and that appointments would be extended to
24 "monthly"); *Cf. Warre v. Comm'r of Soc. Sec.*, 439 F.3d 1001, 1006 (9th Cir. 2006)
25 ("Impairments that can be controlled effectively with medication are not disabling for the

1 purpose of determining eligibility for SSI benefits.”).

2 The ALJ also gave clear and convincing reasons to conclude that Plaintiff’s mental
3 impairments are non-severe because they “do not cause more than minimal limitation in . . .
4 [the] ability to perform basic mental work activities.” (ALJ’s Decision, AR at 54). Again
5 relevant to the ALJ’s determinations were inconsistencies between Dr. Mitchell’s official
6 statements and treatment notes. (*Id.* at 57) (“Dr. Mitchell’s treatment notes do not even mention
7 panic attacks and Dr. Mitchell does not mention anxiety and panic attacks in his prior letter
8 from October 2015”). Further, the ALJ explained reasons for relying on DDS’ opinion that
9 Plaintiff’s mental condition posed only mild difficulties and was non-severe. (*Id.* at 54). While
10 Plaintiff attributes error to the R&R in making a *post hoc* rationale to support the ALJ’s
11 decision as to the severity of Plaintiff’s mental health symptoms, the R&R cited the same
12 medical records as those discussed in ALJ’s decision. (*Id.*) (citing Progress Notes, Ex. 19F to
13 AR, ECF No. 17-1) (dated 1/4/2016 to 7/03/2017, showing appointments extended to a
14 “monthly” basis); (R&R 5:16–6:2).

15 Plaintiff is correct, however, in her contention that the ALJ committed error by applying
16 less weight to Dr. Mitchell’s testimony about her mental health impairment because Dr.
17 Mitchell was not a psychologist, psychiatrist, or specialist in mental health treatment. (*See*
18 ALJ’s Decision, AR at 57) (“Dr. Mitchell is a general practitioner, not a psychologist or
19 psychiatrist, and has no special expertise regarding the claimant’s alleged anxiety and panic
20 attacks. While the opinion has been considered, that fact detracts somewhat from the weight it
21 deserves.”). The Ninth Circuit has long recognized that a treating physician’s opinion on the
22 mental state of his patient constitutes “competent psychiatric evidence” which “may not be
23 discredited on the ground that he is not a board certified psychiatrist.” *See, e.g., Lester v.*
24 *Chater*, 81 F.3d 821, 833 (9th Cir. 1995), *as amended* (Apr. 9, 1996). The ALJ did, however,
25 give several *other* reasons to give only partial weight to Dr. Mitchell’s testimony, as discussed

1 above. Accordingly, when faced with these proper considerations, the remaining issue is
2 whether it was harmless error for the ALJ to apply less weight to Dr. Mitchell's reports on
3 Plaintiff's mental health condition due to a lack of specialization. The Court addresses
4 harmless error in *Section C* below.

5 **B. Objection Two**

6 Plaintiff's second objection contends that, contrary to the ALJ's decision and R&R,
7 medical records do not reflect her pain being well controlled with conservative treatment. (Obj.
8 at 4) (stating that objective evidence shows her conditions worsening over time and not
9 responding to attempts at intervention such as injections, physical therapy, and pain
10 medications). Accordingly, Plaintiff argues that the ALJ should have given full weight to her
11 testimony of severe, non-improving symptoms as she claimed. (*Id.* at 4–5).

12 “The Ninth Circuit has established a two-step analysis for determining the extent to
13 which a claimant's symptom testimony must be credited.” *Tina M. v. Comm'r of Soc. Sec.*, 418
14 F. Supp. 3d 614, 618 (W.D. Wash. 2019) (quotations omitted). The ALJ must first determine
15 “whether the claimant has presented objective medical evidence of an impairment that ‘could
16 reasonably be expected to produce the pain or other symptoms alleged.’” *Id.* (quoting *Garrison*
17 *v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014)). If the claimant satisfied the first step, the
18 court must then determine if the ALJ's rejection of the claimant's testimony about the severity
19 of symptoms is supported by “specific, clear and convincing reasons for doing so.” *Lingenfelter*
20 *v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). “An ALJ may reject a plaintiff's symptom
21 testimony if her daily activities contradict her testimony or meet the threshold for transferable
22 work skills.” *Tina M.*, 418 F. Supp. at 619 (citing *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
23 2007)) (quotations omitted).

24 Only the second step of the analysis is at issue here. (*See* ALJ's Decision, AR at 56) (“I
25 find that the claimant's medically determinable impairments could reasonably be expected to

1 cause the alleged symptoms.”). The ALJ found that Plaintiff’s statements concerning the
2 intensity, persistence, and limiting effects of her symptoms are “not entirely consistent with the
3 medical evidence” or Plaintiff’s daily activities. (*Id.*). Plaintiff, by contrast, contends that her
4 medical records and testimony about daily activities are not inconsistent with being unable to
5 sit, walk, use her hands, or concentrate throughout a typical workday. (Obj. at 5).

6 The Court recognizes how “the mere fact that a plaintiff has carried on certain daily
7 activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in
8 any way detract from her credibility as to her overall disability.” *Vertigan v. Halter*, 260 F.3d
9 1044, 1050 (9th Cir. 2001) (quotations omitted). But here, evidence showed Plaintiff’s
10 activities being more than these minimal tasks. The ALJ cited how Plaintiff “flew out-of-state
11 with her daughter with no problems” and “reported she was able to stay calm during the
12 flight.”² (ALJ’s Decision, AR at 56). The ALJ further noted Plaintiff’s report about staying
13 active by volunteering at church summer camp, helping her neighbor, and dog sitting. (*Id.*);
14 (Progress Note dated July 7, 2016, Ex. 19F to AR at 601, ECF No. 17-1). The ALJ also
15 supported the credibility determination with substantial evidence and specific, clear reasons by
16 pointing to Plaintiff’s decision not to seek second opinions about orthopedic surgery, and,
17 instead, to continue with routine physical therapy appointments. Altogether, under the
18 applicable standards on appeal, the Court finds that there is substantial evidence in the record to
19 support the ALJ’s conclusions concerning Plaintiff’s testimony. *See Ford v. Saul*, 950 F.3d
20 1141, 1154 (9th Cir. 2020); *Bray v. Comm’r*, 554 F.3d 1219, 1222 (9th Cir. 2009) (Substantial
21 evidence means “more than a mere scintilla, but less than preponderance.”).

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23 ² Plaintiff contends there was not enough information in Plaintiff’s medical records about the flight for the ALJ
24 to determine that it supported non-severe symptom levels. However, no facts show Plaintiff’s travel being so
25 short in duration that it was error for the ALJ to rely on it as support for Plaintiff’s ability to complete a normal
workday, especially when considering breaks associated with an industry-standard schedule. The ALJ’s
inference appears reasonable from the objective evidence, and the Court does not find the ALJ’s conclusion
erroneous in this regard. *Cf. Molina*, 674 F.3d at 1111 (“[W]e must uphold the ALJ’s findings if they are
supported by inferences reasonably drawn from the record”).

1 **C. Objection 3—Harmless Error**

2 The Court finds two errors with the ALJ’s decision: (1) applying less weight to Dr.
3 Mitchell’s opinion on mental impairment because he was not a specialist; and (2) rejecting lay
4 witness testimony from Plaintiff’s sister on the severity of Plaintiff’s symptoms. Accordingly,
5 the next issue is whether those errors were “harmless.” Errors are “harmless” when “it is clear
6 from the record” that they were “inconsequential to the ultimate nondisability determination.”
7 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). The party “attacking the agency’s
8 determination” has the burden of showing that an error is harmful. *Molina*, 674 F.3d at 1111.

9 The Court finds that Plaintiff has not shown the ALJ’s errors to be more than harmless;
10 and thus, the Court does not order remand to the Social Security Administration. Beginning
11 with the weight given to Dr. Mitchell’s testimony about Plaintiff’s mental health conditions, it
12 does not appear that this error played a role in the ALJ’s ultimate findings. (*See* ALJ’s
13 Decision, AR at 57) (showing that Dr. Mitchell’s opinion “ha[d] been fully considered,” and his
14 lack of specialty only detracted “somewhat”). The ALJ extensively noted that the reason for
15 giving only partial weight to Dr. Mitchell’s testimony came from inconsistencies in reports and
16 the objective medical evidence. (*Id.*). Though the ALJ should not have detracted weight based
17 solely on Dr. Mitchell not specializing in mental health treatment, substantial evidence and
18 clear and convincing reasons otherwise supported the ALJ’s application of partial weight to Dr.
19 Mitchell’s opinion. Substantial evidence also supports the ALJ’s ultimate findings that
20 Plaintiff’s mental impairments do not cause more than minimal limitations.³ *See Molina v.*
21 *Astrue*, 674 F.3d 1104, 1115–1116 (9th Cir. 2012) (discussing how, in each case, the court
22 looks to the record as a whole to determine whether an error could alter the outcome).

23 Next, concerning the statement from Plaintiff’s sister, Ms. Baggett-Jefferson, Plaintiff
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25 ³ While more weight is generally given to the treating physician’s opinion, “it is not . . . necessarily conclusive as to either a physical condition or the ultimate issue of disability.” *Dixon v. Saul*, 411 F. Supp. 3d 837, 850 (N.D. Cal. 2019) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

1 argues that this testimony corroborates Dr. Mitchell's opinion. (Obj. at 6–7). Had the ALJ
2 properly considered it, according to Plaintiff, it would have established a disabling degree of
3 limitation. (*Id.*). However, the Court does not find that the ALJ's error in rejecting Ms.
4 Baggett-Jefferson's testimony was more than harmless, even when combined with the error
5 concerning Dr. Mitchell's opinion. The ALJ provided clear and convincing reasons, supported
6 by substantial evidence, for the conclusion that Plaintiff's mental impairments are non-severe.
7 (*See* ALJ's Decision, AR at 54, 56–57, 58) (citing the opinion of DDS and prior medical
8 records showing a stable, improving condition). Additionally, Ms. Baggett-Jefferson's broad
9 statement that Plaintiff was "unable to work" came before Plaintiff's medical records noting
10 improvement in her mental condition and testimony about her daily activities. (Function Report
11 from Pauline Baggett-Jefferson, Ex. 10E to AR, ECF No. 17-1) (dated December 30, 2015);
12 (Progress Notes, Ex. 19F to AR at 587, 591) (dated January 4, 2016, to June 30, 2017). Indeed,
13 the ALJ considered essentially identical concerns about Plaintiff's limitations when discussing
14 Dr. Mitchell's opinion before ultimately denying benefits due to recent improvements, daily
15 activities, and the opinion of DDS. (ALJ's Decision, AR 54, 56–57, 58). Accordingly,
16 Plaintiff's Objection does not show that the ALJ committed more than harmless error.

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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Court **ADOPTS** Judge Ferenbach's R&R, (ECF
3 No. 21), to the extent that it is consistent with this Order. Plaintiff's Objection, (ECF No. 22),
4 is **OVERRULED in part** and **SUSTAINED in part**.

5 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Reversal and/or Remand,
6 (ECF No. 18), is **DENIED**, and Defendant's Counter-Motion to Affirm Agency Decision,
7 (ECF No. 19), is **GRANTED**.

8 The Clerk of Court shall close the case.

9 **DATED** this 31 day of March, 2020.

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13 Gloria M. Navarro, District Judge
14 United States District Court
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